IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

**:: O R D E R ::**

**(1)- D.B. INCOME TAX APPEAL NO. 84/2002**
**(For Assessment Year 1993-94)**
**(Zakir Hussain Vs. CIT, Udaipur and Anr.)**

**(2)- D.B. INCOME TAX APPEAL NO. 82/2002**
**(For Assessment Year 1995-96)**
**(Zakir Hussain Vs. CIT, Udaipur and Anr.)**

**DATE OF ORDER :: 07.11.2005**

**PRESENT**

**HON'BLE MR RAJESH BALIA,J.**
**HON'BLE MR R.P.VYAS,J.**

Mr Arun Bhansali, for the appellant/s
Mr K.K. Bissa, for the respondent/s.

The Income Tax Appeal No.84/2002 filed by Zakir Hussain assessee relate to assessment year 1993-94 and arise out of the common order passed by the Income Tax Appellate Tribunal, Jodhpur Bench, Jodhpur in appeals filed by the present appellant Zakir Hussain as well as appeal filed in respect of same assessment year by Smt. Huma Hussain wife of the present appellant Zakir Hussain.

The questions framed at the time of admitting the appeal No.84/2002 relating to assessment year 1992-93 were as under :-

"(i)- Whether in the facts and circumstances the Tribunal was right in holding that permission to raise additional grounds in appeal can be granted only if such additional grounds are also taken within the period of limitation for filing the appeal, particularly when the question sought to be raised was purely a question of law ?

(ii)- Whether in the facts and circumstances the Tribunal ought to have allowed the additional grounds raised by the assessee which was pure question of law raised on the basis of Hon'ble Supreme Court decision settling the law on the issue ?

(iii)- If the additional grounds are taken into consideration whether levy of interest under Section 234A and 234B, without there being specific directions to that effect could be upheld in view of the decision of the Supreme Court in CIT Vs. Ranchi Club 247 ITR 209?

(iv)- In the facts and circumstances, the finding that the explanation of Smt. Huma about the receipt of cash gifts from her parents at the time of her marriage and thereafter during the previous year 1991 in which marriage took place until the assessment order 1993-94 has been rejected contrary to material on record and without holding any enquiry into correctness of explanation when the initial burden of proving the source of instalment has been discharged by the assessee, the evidence placed by her goes unrebuted?

(v)- If the answer to the aforesaid question is found to be negative whether the additions could be made on account of undisclosed income relatable to such gifts at all ?

(vi)-Whether in the facts and circumstances the explanation furnished

> by Smt. Huma as the receipt of the gifts during the relevant years deserved to be rejected ?
>
> (vii)-Whether such amount could be clubbed substantively in the hands of the assessee?
>
> (viii)- In the facts and circumstances whether the Tribunal was right in law in making additions of Rs.1,94,000/- substantively in the hands of the assessee by clubbing the amount of gifts received allegedly by Smt. Huma from her parents and relatives and interest received therefrom?

The appeal No. 82/2002 filed by Zakir Hussain relates to assessment year 1995-96 against the common appellate order passed by the Income Tax Appellate Tribunal in the appeals of Zakir Hussain-appellant as well as by his wife Smt. Huma Hussain.

For Assessment Year 1995-96 in the Appeal No. 82/2002 following questions of law were framed at the time of admission of appeal :-

> "(i)- Whether in the facts and circumstances of I.T.A.T. was justified in law in clubbing Rs.77,502/- in the hands of appellant on substantive basis by rejecting explanation furnished by Smt. Huma Hussain without holding any enquiry in the correctness of her statement mainly on the basis of conjectures and surmises ?
>
> (ii)- In the facts and circumstances even if the explanation of Smt. Huma was

> to be rejected, whether addition could be made on substantive basis in the petitioner's assessment?
>
> (iii)- Whether in the facts and circumstances, the Tribunal was right in holding that permission to raise additional grounds in appeal can be granted only if such additional grounds are also taken within the period of limitation for filing the appeal, particularly when the question sought to be raised was purely a question of law?
>
> (iv)- Whether in the facts and circumstances, the Tribunal ought to have allowed the additional grounds raised by the assessee which was pure question of law raised on the basis of Hon'ble Supreme Court decision settling the law on the issue?
>
> (v)- If the additional grounds are taken into consideration whether levy of interest under Section 234A and 234B, without there being specific directions to that effect could be upheld in view of the decision of the Supreme Court in CIT Vs. Ranchi Club 247 ITR 209?"

The controversy in both the appeals in substance is common and arise from common facts and circumstances from an order of ITAT which is common and proceeds on same grounds for both years so far as controversies raised in these two appeals.

We shall presently notice that some of the aforesaid questions are not voluntarily framed and some of the question in appeal No. 84/2004 are really not related to the case of Zakir

Hussain. Because of the common order and the facts, common set of questions were framed both in the case of Zakir Hussain as well as in the case of Smt. Huma Hussain. It would be appropriate for the purpose of present appeal to redraft the questions giving out the crux of the controversy in these two appeals relating to Zakir Hussain.

The first controversy relates to demand on account of charge of interest under Sections 234A and 234B though the same had not been taken in the memo of appeal before the Tribunal but the assessee has sought permission to raise additional ground challenging the validity of charge of interest relying on the ratio of Supreme Court decision in the case of CIT Vs. Ranchi Club, 247 ITR 209 laying down condition precedent before the demand of charge under Section 234A and 234B could be raised. The permission to raise additional ground was declined by the learned Tribunal only on the ground that since the additional ground was not raised within the limitation for filing the appeal, the same cannot be permitted. This gives rise to following substantial questions in this case :-

(i)- Whether the Tribunal was justified in declining permission to raise additional grounds merely on the ground that these grounds were not raised within a period of limitation for filing appeal against the order of CAT ?

(ii)-If the permission sought is granted whether interest under Section 234A and 234B could be levied in the present case ?

The other controversy which relates to the assessment of Zakir Hussain is that for the two assessment years; Smt. Huma wife of the assessee Zakir Hussain had submitted her returns in response to the notices issued under Section 148 of the Income Tax Act, 1961. Such notices have been issued as a consequence of search which was conducted on the residential premises of Shri Hafiz Mohd., who is father of Zakir Hussain, the present assessee-appellant; and father in law of Smt. Huma.

Smt. Huma, wife of the present assessee in her return for assessment year 1994-95 declared her income by way of interest from the amount advanced by her for two different periods, and has also claimed that she received certain amount of gifts by her from the parents and relative at the time of marriage and from her parents

thereafter. The Assessing Officer rejected the explanation about the sources of investment disclosed by Smt. Huma but made a protective assessment in the hands of Smt. Huma. However, the income assessed in the hands of Smt. Huma by treating the receipts shown her by way of gift also to income from undisclosed sources, was clubbed with the income of her husband Zakir Hussain, and he was substantively assessed in respect of income of Smt. Huma for the assessment year 1993-94 and for assessment year 1995-96.

For the assessment year 1995-96, Smt. Huma has disclosed her income in her return at Rs.30,000/-. She has shown in her return the opening capital balance at Rs.1,66,400/- and further shown Rs.21,000/- as interest income for previous income relevant to assessment year 1995-96. The explanation furnished by said Shri Hafiz Mohd. in respect of investment shown by reducing interest was not accepted and the entire investment as well as the income declared by her as a protective measure was assessed in the hands of the present appellant as a result of induction of Smt. Huma in respect of these assessments. However, the said income was assessed substantively in the hands of assessee-appellant

in respect of assessment year 1995-96 also. As a result of the aforesaid assessment of income on substantive basis in the hands of Zakir Hussain, the following third substantial questions of law arises in this regard in this appeal :-

> (iii)- Whether in the facts and circumstances of the case there was any material on record on the basis of which the unexplained investment, disclosed by Smt. Huma, explanation about which was not accepted by A.O., could be assessed in the hands of Zakir Hussain ?

So far as the first two questions are concerned, it is pointed out by the learned counsel for the appellant that the power to permit additional grounds to be raised vests in Tribunal. Subject to permission of Tribunal, additional plea can be raised at any time. No period of limitation is prescribed for raising additional plea. The Tribunal could not have refused to consider the question of grant of permission for raising additional plea or ground solely on the basis of the fact that when such plea was raised,period for filing appeal against order under appeal had already expired.

The specious plea on which the tribunal

refused the request to entertain the additional plea sought to be raised by the assessee was a pure question of law and asserted to be governed by principle laid down by the Hon'ble Supreme Court which binds all Courts and Tribunal at all stages, cannot be sustained on any principle whatsoever.

The Tribunal is free to lay down practice and procedure to conduct the matters before it. The Income Tax Appellate Tribunal Rules, 1963 lays-down such Rules. Rule 11 gives very wide power to the appellate tribunal to permit raising of any additional ground at any stage of proceedings in deciding the appeal without any string of limitation so much so not only it confers the powers on Tribunal to decide the appeal on the grounds set forth in memorandum of appeal or such grounds raised with the leave of the Tribunal, but it can travel beyond it at the time of hearing. The only constraint is that any party likely to be affected by considering such new and additional ground must be provided with sufficient opportunity of being heard in that regard. Rule 11 reads as under :-

**"11. Grounds which may be taken in**

> **appeal :-** The appellant shall not, except by leave of the Tribunal, urge or be heard in support of any ground not set forth in the memorandum of appeal, but the Tribunal, in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal under this rule :
>
> Provided that the Tribunal shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of being heard on that ground."

The ambit and power of the Appellate Tribunal was firstly stated by the Hon'ble Supreme Court in Commissioner of Income Tax, Madras Vs. S.Nelliappan reported in 66 ITR 722. It was a case in which the Tribunal has allowed the assessee to raise certain contentions relating to the cash credits which were not made the subject matter of a ground in the memorandum of appeal. The issue about the Tribunal's right in permitting the new ground to be raised at the time of hearing which was not set forth in the memorandum of appeal and granting relief thereon by recording the findings in which memorandum of appeal was sought to be made subject matter of reference under Sec. 66 of the Income Tax Act, 1922. The Tribunal as well as the Hon'ble High Court had rejected the application for referring the aforesaid question as a question of law to

the Court.

The Hon'ble Supreme Court while rejecting the appeal of the Revenue stated as under:-

> "In hearing an appeal the Tribunal may give leave to the assessee to urge grounds not set forth in the memorandum of appeal, and in deciding the appeal the Tribunal is not restricted to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal. The Tribunal was, therefore, competent to allow the assessee to raise the contention relating to the cash credits which was not made the subject matter of a ground in the memorandum of appeal. It cannot be said that in accepting the contention of the assessees that the cash credits represented income from the business withheld from the book, the Tribunal made out a new case inconsistent with the assessee's own plea. **In any event the Tribunal is not precluded from adjusting the tax liability of the assessee in the light of its findings merely because the findings are inconsistent with the case pleaded by the assessees.**"

The Court went on to say that the Tribunal is not precluded from adjusting the tax liability of the assessee in the light of its findings merely because the findings are inconsistent with the case pleaded by the assessees. Thus, allowing a new point to be raised at the time of hearing on the basis of existing finding when limitation for filing appeal has long expired was not even found

to be a question of law worth requiring any reference.

The principle was reiterated and explained in wide amplitude in National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax; 229 ITR 383 in which it was noticed that the power to allow additional ground to be raised at the time of hearing vested in the Appellate Tribunal which has direct nexus with the object of the taxing powers. It was a case which arose in like circumstances as the present case. The assessee has sought to ascertain the conditions before the tribunal by drawing its attention to its decision by claiming that the assessee is entitled to certain relief in respect of certain conditions made by the Section Officer which the Tribunal had earlier not found to taxable. The tribunal has declined to undertake the plea. The assessee was unsuccessful in his plea before the High Court, on a reference being made about the jurisdiction of Tribunal to allow raising of such grounds which were not urged before the appellate authority earlier. Allowing the appeal of the assessee, the court said:-

"Under section 254 of the Income Tax

> Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. **The purpose of the assessment proceedings before the taxing authorities is to asses correctly the tax liability of an assessee in accordance with law.** If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal / cross objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier."

Expressing the similar view in the case of Jute Corporation of India Ltd. Vs. CIT (1991) 187 ITR 688, the Apex Court observed that the appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with

all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Authority in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income tax Officer.

The Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Authority Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Authority Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

The Tribunal in refusing to entertain the plea raised by the assessee on the anvil of binding decisions in respect of chargeability of interest under Sections 234A and 234B which has

declined to exercise jurisdiction vested in it by law by ignoring the well settled principle, that it owes a duty to determine correct tax liability which in the context include liability arising on account of charging Section, penalty on interest leviable under the Act and as per the binding precedent of Hon'ble Supreme Court.

In this connection, it would be apposite to draw attention to two more decisions which had bearing on the very same controversy.

In JDB Srinivasan Vs. Secretary of the Govt. of Tamil Nadu and Ors. reported in (1994) 92 STC 631 (Mad.), the Madras High Court held that since the raising of additional grounds was a part of the continuous process of filing the appeal and the appeal having been filed in time, the additional grounds which could not be put forth before the lower authority or along with the appeal, could be raised subsequent to the filing of the appeal. The Court further observed that there was no time limit for raising additional grounds nor was there a rigid rule in that regard.

The matter also received the attention of

this Court also in Shilpa Associates Vs. Income Tax Officer (2003) 181 CTR (Raj.) 92. It was a case in which the Tribunal has rejected the application submitted by the assessee solely on the ground that such ground can only be raised within limitation for filing of the appeal. The court after referring the provision of Sec. 253 of the Act of 1961, held as under :-

> "Thus, the limitation is provided only for the purpose of filing the appeal. Once the appeal is filed within the limitation, the memo of appeal can be amended as per the practice and procedure. The view does not require any precedent to support. If it is required, even for the cosmetic purposes, the learned counsel has referred to a decision of the Madras High Court in JDB Srinivasan Vs. Secretary of the Government of Tamil Nadu and Ors. (1994) 92 STC 631 (Mad). In the said case, the Court held that since the filing of additional grounds was a part of the continuous process of filing the appeal and the appeal having been filed in time, the additional grounds which could not be put forth before the lower authority or along with the appeal, could be raised subsequent to the filing of the appeal. The Court further observed that there was no time limit for filing additional grounds, nor was there a rigid rule in that regard. We are in complete agreement with the view expressed by the Madras High Court."

In the said case, the Court held that since the filing of additional grounds was a part of

the continuous process of filing the appeal and the appeal having been filed in time, the additional grounds which could not be put forth before the lower authority or along with the appeal, could be raised subsequent to the filing of the appeal. This Court has taken the same view as has been taken by Madras High Court in JAB Srinivasan's case (supra).

As a result of aforesaid discussion, we are in respectful agreement with the view expressed by the Madras High Court in JDB Srinivasan's case (supra) and of this Court in Shilpa Associates case (supra).

As a result, the first question re-framed as above must be decided against the Revenue. We hold that the Tribunal was not justified in refusing to allow the assessee to raise additional ground which required application of mind by the Tribunal and by the High Court which otherwise bound the authority in correctly assessing the tax liability on the ground of limitation.

So far as merit of the contention that no notice of demand claiming interest under any of

the provisions under Sections 234A, 234B and 234C can be issued unless there is a specific order to that effect in the assessment order, the matter appears to be concluded by the reasoning given in decision of the Patna High Court in Udai Mistan Bhandar & Complex and 2 others Vs. Commissioner of Income Tax and Ors. reported in 222 ITR 44 and which decision of Patna High Court has been merged in the decision of the Hon'ble Supreme Court, on appeal, when it was dismissed.

The question, which had been adverted to by the Patna High Court was whether a notice of demand under Section 156 of the Income Tax Act, 1961, could be issued when there was no specific order levying interest in assessment order, and secondly whether insertion of the words "charge interest, if any" or "charge interest as per rules" through the notice of demand makes any difference. The demand notices which were in consideration before the Patna High Court related to interest charged under Sections 234A and 234B. The court noticed the provision of Section 156 which inter alia ordains that when any tax, interest, penalty or fine or **any other sum is payable in consequence of any order passed under this Act**, the Assessing Officer served upon the

assessee a notice of demand in the prescribed form specifying the sum so payable under the Act. The Division Bench of the Patna High Court held as under :-

> "From the bare reading of section 156 it is clear that notice of demand claiming interest can be issued only when there is order in the assessment order levying interest. Except in the cases of the assessee Tej Kumari Devi (C.W.J.C. No. 2732 of 1995(R)and C.W.J.C. No. 2780 of 1996(R)) there is no order in any of the assessment orders levying interest under any of the sections 234A, 234B or 234C. To use the expression "charge interest, if any" or "charge interest as per rules" cannot be read to mean that the Assessing Officer has passed orders "charge interest under all the aforesaid sections". The order to charge interest has to be specific and clear, as for that matter any order to charge any tax, penalty or fine. It is different thing as in the case of Taj Kumari Devi where there is an order levying interest but it left the calculation to the office. The assessee must be made to know that the Assessing Officer after applying his mind has ordered the charging of interest and under which of the selections of the Act. Interest is payable under various provisions like for default or delay in furnishing the return of income [Sections 139(8) and 139(9)] and also under the various sections for default in payment of advance tax (sections 215, 216, 217, 234B and 234C). A notice of demand is somewhat like a decree in a civil suit which must follow the order. When a judgment does not specify any amount to be charged under any particular section, the decree cannot contain any such amount. Similarly when the assessment order is silent if any interest is leviable, the notice of demand under section 156 of the Act cannot go beyond

> the assessment order and the assessee cannot be served with any such notice demanding interest. We, therefore, do not feel any difficulty in coming to the conclusion that the notices of demand in C.W.J.C. Nos. 3609 of 1995(R), 3287 of 1995(R) 3562 of 1995 (R), 3494 (R) of 1995 and 3527 of 1995 (R) have to be quashed so far these relate to charging of interest under Section 234A, 234B or 234C of the Act. We get support for the view which we have taken from the decisions of the Calcutta High Court in Manohar Gidwany v. Cit [1983] 139 ITR 498 and CIT v. Wiliard India Ltd. [1993] 202 ITR 423 and that of the Gauhati High Court in Cit v. Namdang Tea Co. India Ltd. [1993] 202 ITR 414.

While answering these questions, the other question that came up for consideration was whether interest is liable to be charged on the returned income was held to be referred to a larger bench.

Be that as it may, the judgment of the Patna High Court was challenged before the Hon'ble Supreme Court. The SLP was granted and appeals were admitted. Ultimately, appeals were dismissed by the Hon'ble Apex Court recording a finding that there is no merit in the appeals. Thus, the reasoning of the Patna High Court about the requisite to be full-filled before valid demand notice is that it could be founded only if specific order for charging interest under

particular provision was approved. The Patna High Court in the case of Tej Kumari Devi held that there was no specific order of charging interest under Sections 234A and 234B and set-aside the demand notices as having been issued without any order for charging the interest payable under Sections 234A and 234B.

The present case is no different. The assessment order in the present case only speaks about charge of interest as per Rules as was the case in Ranchi Club Ltd., wherein the principle was approved by the Hon'ble Supreme Court that it was not sufficient to make interest payable as a consequence of order passed under the Act.

Coming to the last question about additions framed by the Court appears to be clearly against the revenue. We have noticed in brief, the circumstances in which the additions have been made. The Assessing Officer in his assessment order for the year 1993-94 stated as under:-

> "In the case of Smt. Huma wife of assessee assessment at Rs.1,97,400/- was made on protective basis vide order dated 29.2.2000. The same is being taken on substantive basis in the hands of Shri Zakir Hussain in view of the findings of the assessment order of Smt.Huma."

Likewise for the assessment year 1995-96 in the case of the appellant, it was recorded:-

> "In the case of Smt. Huma wife of assessee assessment at Rs.1,91,075/- was made on protective basis vide order dated 29.2.2000. The same is being taken on substantive basis in the hands of Shri Zakir Hussain in view of the findings of the assessment order of Smt.Huma."

This necessarily requires going through the assessment orders in the case of Smt. Huma. So far as explanation submitted by Smt. Huma about the gift received by her, investment made by her are concerned, the same has not been accepted. Without prejudice to the contention raised in appeals filed by Smt. Huma about the merit or finding recorded in her case, for the purpose of present appeal, assuming that the explanation submitted by Smt. Huma about her source and her investment were not found satisfactory by the Assessing Officer, it is apposite to notice the finding recorded by A.O. And subsequently affirmed by the appellate authorities. It reads as under :-

> "In the absence of the copies of accounts from the debtors and interest received person wise, the evidence of giving the loan is not established in

> view of the above facts, it appears to be a case of capital formation only. But as the return of Income has been filed by the assessee and capital account depicts the capital accretion, the income is to be assessed in the hands of the assessee on protective basis. As it has been established that it is only a case of capital formation, the entire capital formed upto 31.3.93. Including the amount of interest received and gift received as shown on which the assessee had failed to give documentary evidence to the satisfaction of the AO, the entire amount of opening capital, interest income shown and gifts received are being treated as the income of the assessee for the year on the protective basis. **But as the assessee was not having any source of income as admitted in her statement under Sec. 132 (4) recorded on 28.9.94 during the course of search on the residence of her father in law Shri Hafiz Mohd. This capital formation will be considered as income of the husband of the assessee Shri Zakir Hussain in his case on substantive basis as representing his undisclosed sources of income.**"

Similarly, for assessment year 1995-96, the only ground for which the assessment on substantive basis in the hands of Shri Zakir Hussain was made can be stated as under:-

> "As in her statement recorded under Section 132(4) on 28.9.94, she had not admitted any source of income or some body else's money lying with her or her money lying with any body else, **the income shown in the return of income is not being considered as her income but as the assessee has filed a return of income the assessment is being framed in her case on protective basis and the**

**same shall be considered on substantive basis in the hands of her husband, as the assessee does not have any source of income and the income shown was simply to generate capital out of undisclosed source of income of the husband of the assessee.**"

It is an exercise groping in dark. The order has two fold findings. Firstly, that source of investments claimed by Smt. Huma was found to be unsatisfactory by A.O. Consequence of such satisfaction as provided in Sec.69 is that value of such investment can be deemed to be income of the assessee in whose possession or name such investments are deemed to be his / her income from undisclosed sources for such Assessment Years.

The second part of finding is that because explanation about source of investments in the name of Smt. Huma is unsatisfactory, it is income of her husband from undisclosed sources. In other words, the A.O. on rejecting the explanation about sources of investment, automatically linked the source of such investment by wife to be arising from undisclosed income of her husband. No link whatever has been referred to suggests that the investment claimed by Smt. Huma about which her explanation was

found to be unsatisfactory in anyway related to her husband. Surprisingly, even the search was not directed against the present appellant Zakir Hussain. It was directed against Shri Hafiz Mohd., father of the present appellant. The residential premises of Shri Hafiz Mohd was searched. The unexplained documentary evidence collected by the revenue during the course of search does not point finger to any other person who could remotely claim investments claimed by Smt. Huma to be hers and while specific provisions of the Income Tax Act envisages that where an assessee is found to be in possession of any valuable or having made certain investment out of her unknown source of income, the value of such investment may be deemed to be income of the assessee. It may further be deemed to be income for the year in which such valuables are found to be in possession of the assessee or investment are disclosed. Apart from the legal fiction created under the provisions contained from Section 68 and 69C no other provision has been brought to our notice where investment found to be in the name of wife and disclosed by her, on rejecting the source of such investment, the A.O. can be allowed to deviate from statutory presumption required to cause and jump on

unprovided presumption to assume such investment to be from undisclosed income of assessee's spouse. No such presumption is permissible in law, nor it arose from fact. If the Assessing Officer wanted the investment disclosed by wife to be clubbed in the hands of her husband, on finding that explanation about sources of such investment submitted by her was not satisfactory, it was for the revenue to have bring on specific material on record to link such investment with the husband of Smt. Huma. No such material has been referred to or brought on record. In the present appeal automatic substantive assessment in the hands of assessee by clubbing the same with his income cannot be sustained on any ground. The reason adopted by the authority only permits it to be assessed as the income of the wife from explained source in her hands.

Accordingly, the question No.3 as reframed in the case of Zakir Hussain has to be decided in negative in favour of the assessee and against the revenue relating to clubbing of income of Smt. Huma Hussain with the income of appellant Zakir Hussain and raising a Demand on account of interest under Sec.234A and 234B without any specific order.

Accordingly, the appeal No. 84/2002 is allowed and the order passed by the Tribunal as well as CIT appeals and the Assessing Officer are set-aside to the extent indicated above.

No order as to costs.

(R.P.VYAS), J. (RAJESH BALIA),J.

Rm/